United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2099

To be argued by
JOHN M. O'CONNOR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2099

LEONARD SHELTON,

Petitioner-Appellant,

—v.—

LARRY TAYLOR, WARDEN, and MAURICE SIGLER, CHAIRMAN, UNITED STATES BOARD OF PAROLE,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF RESPONDENTS-APPELLEES

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LARRY TAYLOR, WARDEN, and MAURICE SIGLER, CHAIRMAN, UNITED STATES BOARD OF PAROLE,
Respondents-Appellees.

BRIEF OF RESPONDENTS-APPELLEES

Issues Presented

1. Is affirmance of the district court's order dismissing the petition for writ of habeas corpus compelled by the recent decision of the United States Supreme Court in *Moody* v. *Daggett*, — U.S. —, 97 S. Ct. 276 (Nov. 15, 1976).

2. Was the district court correct in refusing to exercise jurisdiction to grant the relief that petitioner requested and dismissing the habeas corpus petition.

3. Assuming for the purpose of argument, that petitioner's due process rights had been violated, is petitioner entitled to the relief he now requests.

Statement of the Case

The petitioner-appellant Leonard Shelton ("Shelton") appeals from an order of the United States District Court for the Southern District of New York (Knapp,

J.) entered August 4, 1976, which dismissed Shelton's petition for a writ of habeas corpus. The district court found that it would be improper to grant the relief Shelton requested "because we have no jurisdiction pursuant to 18 U.S.C. § 2241 over the detainer in question or its consequences. Any challenge to the detainer, we believe, must be brought in the United States District Court in New Jersey—the district where the detainer, was lodged and where the original federal sentence was imposed." App. Exh. Z, p. 4.* Although, the district court dismissed the petition on this ground it stated in *dictum* that it agreed with those courts which had criticized the Parole Board policy challenged by the petitioner Shelton. *Id.* at p. 2. The district court's decision was rendered prior to the decision, on November 15, 1976, in *Moody* v. *Daggett*, — U.S. —, 97 S. Ct. 274, which the respondents argue is dispositive on the substantive issue concerning the Parole Board policy.

Statement of The Relevant Facts

The petitioner-appellant Shelton is a federal parolee who committed a crime in the State of New Jersey while on federal parole. To distinguish the New Jersey crime from the previous federal conviction, it is referred to as Shelton's "second" conviction or "intervening" conviction, since it interrupted the normal running of his federal parole.

Shelton's initial conviction was for the federal crime of bank robbery (18 U.S.C. § 2113). On October 13, 1967, in the United States District Court for the Southern District of New Jersey, Shelton was sentenced, upon his plea of guilty, to a term of ten years in prison. Petition For Writ of Habeas Corpus, p. 1 ("Petition"). After

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* The appellant's appendix on appeal is not paginated. It contains Exhibits A through Z. "App. Exh." refers to the exhibits contained in the appendix on appeal.

confinement for approximately two and one half years in the United States Penitentiary at Lewisburg, Pennsylvania, Shelton was released on federal parole on November 23, 1970. App. Exh. A.

On July 19, 1971, while on federal parole, Shelton was arrested in New Jersey for armed robbery. Petition, p.2. He was indicted on September 14, 1971, in the Superior Court of New Jersey, and on November 21, 1971, he pled guilty to the crime of robbery. He was sentenced on this intervening second conviction to a term of six to eight years. Petition, p. 1-2.

Based on Shelton's commission of a crime, a violation of parole, the Parole Board issued a parole violation warrant on July 23, 1971, and lodged that warrant, known as a "detainer", with the New Jersey authorities having custody of Shelton on his State conviction. *Id.* at 2; App. Exh. B and C.

A notice dated January 11, 1972, informed the petitioner that the detainer was lodged against him. App. Exh. D. While Shelton was incarcerated in the New Jersey prison at Leesberg, the Parole Board conducted periodic dispositional reviews concerning the status of the detainer lodged against him. These reviews were conducted on papers and without an interview, as in provided in 28 C.F.R. § 2.53 (1975). See App. Exh. E through L. Shelton submitted written requests to the Parole Board in connection with these reviews asking that the Board take action to allow his State sentence and his federal sentence to run concurrently. App. Exh. M and O. In December of 1973, petitioner wrote to the Parole Board requesting a "concurrent retroactive sentence" and requesting that he be allowed to remain in State custody and pursue his college education at Leesburg. App. Exh.

O. After each dispositional review, the Board decided to let the detainer stand in status quo, and so informed Shelton. App. Exh. H and L.

Both the 1972 and the 1973 reports of the Parole Board case analyst indicate that Shelton made use of the rehabilitative programs offered at Leesberg, the New Jersey prison. App. Exh. E and K. During his time in the New Jersey prison Shelton earned an Associate in Arts degree and participated in Alcoholics Anonymous. App. Exh. G, J, U. Shelton wrote to the Board informing them of his participation, and the Parole Board requested (App. Exh. F and I) and received reports from the New Jersey prison officials regarding Shelton's status. App. Exh. G and J.

In October of 1974, Shelton filed a petition for writ of habeas corpus in the United States District Court for the District of New Jersey. That petition challenged the detainer and sought its withdrawal on the ground that Shelton had not been given a parole revocation hearing, and that the presence of the detainer deprived him of prison privileges. Petition, p. 3. In the brief submitted in the court below, counsel for petitioner informed the court that the New Jersey petition was to be denied but that no formal decision had then been rendered. See Appellant's brief on appeal, p. 7.

Although Shelton was sentenced to a term of six to eight years by New Jersey, he was eligible for parole as of March 9, 1974 (App. Exh. G), and was released from the custody of the New Jersey authorities on September 9, 1975. Petition, p. 2. However, because of the detainer lodged against him, he was released into the custody of the United States Marshals and placed in confinement in the federal Metropolitan Correctional Center located in the Southern District of New York. Nine days

later, on September 18, 1975, two representatives of the Parole Board gave petitioner a preliminary interview with regard to the question whether the Board would revoke his parole status on the initial federal bank robbery conviction. Petition, p. 2. According to the petition, Shelton requested a "local parole revocation hearing" with counsel present, but was advised at that time that he would be removed to the federal penitentiary at Lewisburg and given a final parole revocation hearing there. *Id.*

While incarcerated at the Metropolitan Correctional Center, Shelton filed a petition for writ of habeas corpus, in the Southern District of New York. This petition was brought before the district court by order to show cause dated October 16, 1975, and made returnable October 28, 1975. On the return date, the district court addressed only the questions of the scheduling and the location of Shelton's final parole revocation hearing. Subsequently, the Parole Board agreed to allow Shelton to remain at the Metropolitan Correctional Center and to receive his final parole revocation hearing there. Shelton received a final parole revocation hearing on November 4, 1975, and was represented by the same counsel now representing him on appeal. Supplemental Affidavit of Phylis Bamberger, p. 1.* The hearing examiners who conducted the revocation hearing recommended that Shelton's federal parole be revoked but that he be re-paroled as of January 20, 1976, two and one half months later, after a parole plan which included attendance at a college had been worked out. *Id.* at 2.

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* No record of the parole revocation hearing is before the court. Counsel for petitioner, who attended the hearing, submitted a supplemental affidavit in support of Shelton's habeas corpus petition relating certain facts concerning the hearing.

In support of his petition for habeas corpus, the petitioner claimed that the federal detainer lodged against him precluded his participation in an educational release program offered by Leesberg, and that the Board's decision to "let the detainer stand" had deprived him of his opportunity to obtain concurrent credit, on both his initial federal sentence and the intervening State sentence, for the time he was incarcerated in the New Jersey prison at Leesberg. The petition for Writ of Habeas Corpus alleged that the federal custody over Shelton, following his release from the New Jersey prison, was unconstitutional because of the Board's decision to postpone the parole revocation hearing until after Shelton's release from the New Jersey incarceration. For relief, the petition requested that the detainer "be removed and petitioner immediately re-released on parole. Alternatively, petitioner must be afforded a local parole revocation hearing at the Metropolitan Correctional Center with representation by counsel." Petition, p. 4.

On December 17, 1975, the district court heard argument from the parties on the question whether the petitioner Shelton was entitled to any relief in addition to the parole revocation hearing he had already obtained. On August 6, 1976, the district court denied Shelton's petition. Shelton filed a Notice of Appeal on August 18, 1976. On October 5, 1976, petitioner moved for an order adjourning the scheduled dates for perfecting the appeal until after the United States Supreme Court reached a decision in *Moody* v. *Daggett*. The affidavit of counsel in support of the motion stated that "the substantive issues raised in this case are whether the Federal Parole Commission must hold a parole revocation hearing for a parolee who commits a new crime. The results will be affected by the Supreme Court decision in *Moody*, which raises the same issues." By order dated October 7, 1976, the schedule for perfecting the appeal was adjourned to

dates subsequent to the argument in *Moody*. The Supreme Court decided *Moody* v. *Daggett* adversely to petitioner Shelton on November 15, 1976.

ARGUMENT

POINT I

The Recent Supreme Court Decision In *Moody* v. *Daggett* Is Controlling And Requires Affirmance Of The Dismissal Of The Habeas Corpus Petition; There Was No Violation Of Any Constitutional Or Other Right Of The Petitioner By Virtue Of The Policy Of Postponing The Parole Revocation Hearing And Decision Until He Was Released From State Incarceration On The Intervening Conviction.

The precise issue raised by the petitioner Shelton has recently been settled in favor of the respondents-appellees Taylor and Sigler by the United States Supreme Court in the case of *Moody* v. *Daggett*, — U.S. —, 97 S. Ct. 274 (Nov. 15, 1976). Petitioner's attempts to distinguish *Moody* are unpersuasive.

A. The Decision in *Moody* v. *Daggett* is Controlling

In *Moody* v. *Daggett*, the petitioner Moody was convicted in 1962 for the federal crime of rape on a Government Reservation. He was paroled in 1966 with almost six years remaining on his term. While on federal parole he shot and killed two persons on a Government Reservation and subsequently pled guilty to second degree murder and manslaughter charges. He received concurrent ten year sentences for these crimes committed while on parole from his rape sentence. As with the petitioner Shelton, the United States Parole

Board * issued a parole violation warrant against Moody. As with Shelton, this parole violation warrant was lodged as a detainer ** with the prison officials who had him in custody for the intervening crime committed while on parole.

Both Moody and Shelton requested the Parole Board to execute the parole violation warrant immediately, *i.e.* at the beginning of their incarceration on the intervening crime, so that the sentences for both the initial crime and the sentence for the intervening crime would run concurrently.*** With regard to both Moody and Shelton,

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* By the Parole Commission and Reorganization Act of 1976, Pub. L. 94-233, the United States Parole Board is now the "Parole Commission." Since Shelton's case was decided under the prior law this brief refers to the "Parole Board."

** As explained by the Supreme Court in *Moody*:

> A detainer in this context is an internal administrative mechanism to assure that an inmate subject to an unexpired term of confinement will not be released from custody until the jurisdiction asserting a parole violation has had an opportunity to act—in this case by taking the inmate into custody or by making a parole revocation determination. When two autonomous jurisdictions are involved, as for example when a federal detainer is placed against an inmate of a state institution, a detainer is a matter of comity.

97 S.Ct. at 275 n. 2.

*** Following "execution" of the warrant the parole violator is deemed to be in the custody of the United States Parole Board on the parole violation charge whether he is then on parole, or incarcerated in a federal or state institution for an intervening crime. Thus, following the execution of the warrant a hearing is held to determine whether parole should be revoked. If parole on the initial federal crime is revoked at the beginning of the incarceration on the intervening crime, the effect will be that the time the prisoner spends incarcerated on the intervening conviction and sentence (state or federal) will be credited both to the intervening sentence and to the initial federal sentence. This concurrent effect, of course, would reduce the total time the prisoner would spend under supervision.

the Parole Board took the position, on its periodic reviews of their status, that it would let the detainer stand during the period of incarceration on the intervening sentence, and would execute the warrant, and decide whether or not to revoke parole, upon their release from incarceration on the intervening sentence. Both Moody and Shelton instituted habeas corpus petitions arguing that, under prior Supreme Court holdings, specifically *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), they were entitled to a prompt hearing, at the beginning of their sentences on the intervening crimes, at which the parole revocation issues would be determined. *Moody* v. *Daggett*, 97 S. Ct. at 275-276; Petitioner [Shelton's] Memorandum of Law in Support of a Petition for Writ of Habeas Corpus, October 21, 1975, Point 1, pp. 6-16.

In its own words, the Supreme Court decided the following issue in *Moody* v. *Daggett*:

> Whether a federal parolee imprisoned for a crime committed while on parole is constitutionally entitled to a prompt parole revocation hearing when a parole violator warrant is issued and lodged with the institution of his confinement but not served upon him. 97 S. Ct. at 275.

The Court noted that this constitutional issue had divided the courts of appeals, citing and supplementing the court of appeals decisions relied upon by the present parties in their memoranda of law to the district court. 97 S. Ct. at 275, n. 1.

Although the opinion in *Moody* makes clear that the result would be the same under the new parole statute, the Supreme Court decided the issue under the former parole statute, the same statute applicable to Shelton.

> The Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219 *et seq.*, was

> enacted shortly after we granted certiorari. The Act renamed the Board the Parole Commission and made other changes in federal parole procedures principally to codify the Board's existing practices. Throughout the progress of this case below, however, parole revocation procedures were controlled by the former statutes, 18 U.S.C. §§ 4205 and 4207 (1970 ed.). 97 S. Ct. at 276 (footnotes omitted).

The Supreme Court then went on to explain the practice and law under the former statutes, the same statutes that controlled the parole revocation procedures for the petitioner Shelton. *Id.* at 276-277. Like the petitioner Shelton, Moody asserted "protected liberty interests in both the length and conditions of his confinement." Moody, like Shelton, argued that his protected liberty interests

> are disregarded in several respects by issuance against him of an unexecuted parole violator warrant, which bars him from serving his 1966 rape conviction sentence concurrently with his 1971 homicide sentences, retards his parole eligibility on the later convictions and adversely affects his prison classification status. He argues that lack of a prompt hearing risks the loss of evidence in mitigation which might induce the Board not to revoke his parole. 97 S. Ct. at 278.

These are exactly the same claims raised by the petitioner Shelton on appeal.

In response to these claims, the Supreme Court stated: "We hold that there is no requirement for an immediate hearing" (91 S. Ct. at 278), reasoning as follows:

> Petitioner's present confinement and consequent liberty loss derives not in any sense from the outstanding parole violator warrant, but from his two

> 1971 homicide convictions. Issuance of the warrant and notice of that fact to the institution of confinement did no more than express the Board's intent to defer consideration of parole revocation to a later time. Though the gravity of petitioner's subsequent crimes places him under a cloud, issuance of the warrant was not a determination that petitioner's parole under his 1966 rape conviction will be revoked; the time at which the Commission must make that decision has not yet arrived. With only a prospect of future incarceration which is far from certain, we cannot say that the parole violator warrant has any present or inevitable effect upon the liberty interests which *Morrissey* sought to protect. Indeed, in holding that '[t]he revocation hearing must be tendered within a reasonable time after the parolee is taken into custody [,]' *Morrissey*, *supra*, at 488, 92 S.Ct. at 2603, we established execution of the warrant and custody under that warrant as the operative event triggering any loss of liberty attendant upon parole revocation. This is a functional designation, for the loss of liberty as a parole violator does not occur until the parolee is taken into custody under the warrant. Cf. 18 U.S.C. § 4206 (1970 ed.); 18 U.S.C. § 4213(d). (Brackets in original)

Both the holding and reasoning of the Supreme Court in *Moody* are directly applicable to the present appeal. Shelton argues on appeal, as he did in the court below, that his right to due process of law is violated by the Parole Board's having deferred the execution of his parole violator warrant until he was released from the sentence on his second crime. The answer to this argument is clearly and unequivocally stated by the Supreme Court in *Moody*: any loss of liberty prior to the deferred hearing is not caused by the lodging of the parole warrant as

a detainer but from the conviction on the intervening crime; the issuance of the warrant and the lodging of the detainer does not have any present or inevitable effect on Shelton's liberty; it is the execution of the warrant and the holding in custody under the parole warrant that triggers any loss of liberty attributable to the parole violator warrant; therefore, there is no requirement for an immediate hearing.

B. Petitioner's Attempts to Distinguish Moody Are Without Merit

Since the Supreme Court was to decide the precise issue raised upon this appeal in the *Moody* case, it was understandable and reasonable for petitioner to request that the appeal in this case await the decision in *Moody*. Now that *Moody* has been decided unfavorably to the petitioner, petitioner attempts to locate some factual difference in the two cases upon which to base an argument distinguishing the explicitly applicable holding in *Moody*. A review of petitioner's brief-on-appeal reveals the following arguments proffered as a basis for distinguishing *Moody*: (1) both Moody's initial crime and his second intervening crime were federal, whereas Shelton's second crime was State and he was incarcerated for that crime in a State institution; (2) the Supreme Court's decision in *Moody* was based on the new parole statute, whereas Shelton's case is governed by the former parole statute; (3) Moody has not yet had his parole hearing at the time of his Supreme Court appeal, whereas Shelton has already had his parole revocation hearing; (4) Moody was not prejudiced by the denial of access to rehabilitative programs while serving the intervening sentence, whereas Shelton was prejudiced by such denial, and the denial was based upon the detainer lodged against him.

Each of these proffered "distinctions" between *Moody* and the instant appeal is without merit. As to the first

argument advanced, the Supreme Court opinion in *Moody* makes clear that the issue as to whether the postponement of the hearing was a violation of due process was in no way dependent upon the incarceration for the second crime being in a State or federal institution. As mentioned above, in stating the issue it was deciding, the Court referred to a parole violator warrant being "lodged with the institution of his confinement but not served upon him." 97 S. Ct. at 275. This language clearly encompasses both federal and state institutions of confinement. Moreover, the Court's footnote 1 to the statement of the issue, setting out the split of decisions in the Circuits on the issue presented, makes explicit the inclusion of the situation in which the prisoner is incarcerated in a State institution for the second intervening crime. In six of the nine cases cited by the Supreme Court as presenting the same issue as that decided in *Moody*, the federal parolee was incarcerated in a State institution on the conviction for the second intervening crime.* The Supreme Court's recognition that the issue it was deciding had divided the circuit courts of appeals compels the conclusion, in light of the number of those circuit court decisions based upon State incarceration for the second crime, that in deciding *Moody*, the Court was

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* *United States ex rel. Hahn* v. *Revis*, 520 F.2d 632 (7th Cir. 1975), mandate recalled No. 74-1057 (Aug. 26, 1975); *Reese* v. *United States Bd. of Parole*, 530 F.2d 231 (9th Cir. 1976), pet. for cert. filed May 3, 1976, No. 75-6703; *Gaddy* v. *Michael*, 519 F.2d 669 (4th Cir. 1975), pet. for cert. filed, Aug. 5, 1975, No. 75-5215; *Orr* v. *Saxbe*, No. 74-341 (MD. Pa., Nov. 27, 1974), aff'd without opinion, 517 F.2d 1399 (3d Cir. 1975), pet. for cert. filed *sub nom. Reese* v. *Levy*, Oct. 10, 1975, No. 75-5594; *Colangelo* v. *United States Bd. of Parole*, No. 74-251 (W.D. Ohio Dec. 11, 1974), aff'd without opinion, 517 F.2d 1404 (6th Cir. 1975); *Small* v. *Britton*, 500 F.2d 299 (10th Cir. 1974).

In *Shepard* v. *United States Board of Parole*, — F.2d — (2d Cir. Sept. 7, 1976; Docket No. 76-2021), the Second Circuit also took a position on this issue, and recognized that the Supreme Court had granted certiorari in *Moody* v. *Daggett*, to resolve the conflict in the Circuits. *Shepard* is now on appeal to the United States Supreme Court, Docket No. 76-752.

deciding an issue that encompassed the situation where a parolee was incarcerated for a second crime committed while on federal parole, regardless of whether that second conviction resulted in incarceration in a State or federal institution.

It may be further observed in passing that a "federal and federal" situation such as Moody's, involving one jurisdiction for both the initial and intervening sentences is a *stronger* case for establishing concurrent custody. Upholding the concept of discrete custody based upon the separate convictions in such a case would establish *a fortiori* the propriety of reaching the same result where the second incarceration was, as here, in an institution of an autonomous jurisdiction. Thus, it is clear from the *Moody* decision, that a prisoner such as Shelton incarcerated in a State institution for a crime committed while on federal parole, has no greater rights than a prisoner incarcerated in a federal institution, such as Moody.

The only point which the decision in *Moody* left open concerning a possible difference with regard to a federal parolee in State prison, involved Moody's claim that the federal detainer lodged against him diminished his opportunity for parole on the intervening sentence. With regard to this claim, the Supreme Court found,

> [a]ssuming for the moment that granting of parole is a protected liberty interest which this warrant impinges, this argument fails to take into account that here the same Commission which will consider petitioner's parole under his 1971 homicide convictions will decide whether to revoke parole granted under the 1966 conviction. The statutory hearing to which petitioner will be entitled upon his application for release on parole will give him the same full opportunity to persuade the Commission that he should be released from federal custody as would an immediate hearing on the parole violator warrant. Whether different

> issues would be presented by different and autonomous parole authorities, we need not consider. 97 S.Ct. at 279.

This tangential "open question" is of no benefit to petitioner Shelton for two reasons. First, neither the Supreme Court in *Moody*, nor any other case cited by petitioner, or that the respondent is aware of, has decided that an adverse impact upon a State parole decision, of itself, is a deprivation of liberty within the cognizance of the constitutional guarantee of due process of law. The second reason that the above quoted language from *Moody* is of no benefit to Shelton is both more fundamental and more compelling: Shelton was in fact granted parole by the State of New Jersey.* It is therefore clear in the present case, if no other, that the presence of the federal parole warrant as a detainer did not prevent the petitioner from receiving a grant of parole by the State institution. This second reason no doubt accounts for the fact that the petitioner never mentioned the denial of State parole as an injury accruing from the placement of the detainer in any of the memoranda of law filed on his behalf in the district court, in any of the other papers submitted to the district court, or in oral argument before the district court.

The second proffered distinction between *Moody* and the present case, that different versions of the parole statutes are involved, is also without merit. As stated above, the Supreme Court clearly stated that it was decid-

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* Shelton pled guilty to the second intervening crime, robbery, on November 21, 1971. He received a sentence of six to eight years. Despite this "six to eight" year term, the record reveals that he was first eligible for parole on March 9, 1974. He was released from the custody of the New Jersey authorities on September 9, 1975.

ing Moody's constitutional claim of violation of due process with reference to the procedures contained in the former parole statute:

> The Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219, *et seq.*, was enacted shortly after we granted certiorari. The Act renamed the Board the Parole Commission and made other changes in federal parole procedures, principally to codify the Board's existing practices. Throughout the progress of this case below, however, parole revocation procedures were controlled by the former statutes, 18 U.S.C. §§ 4205 and 4207 (1970 ed.) 97 S Ct. at 267-77.

The statutes cited as controlling by the Supreme Court, former 18 U.S.C. §§ 4205 and 4207, and the regulations thereunder, are the same statutes and regulations which control the procedures, and the result, in the petitioner Shelton's case. The Supreme Court in *Moody* pointed out that the result would be the same under the new 1976 statute since "The 1976 Act and accompanying regulations, 41 Fed. Reg. 19326 *et seq.* (1976), incorporate the former procedures with few modifications," (97 S.Ct. at 277) and the 1976 Act made "changes in federal parole procedures, *principally to codify the Board's existing practices.*" 97 S. Ct., at 276 (emphasis added). The Court's having added information establishing that the result is the same under the new statute certainly cannot be read so as to undercut its explicit statement that it recognized that the controlling procedures in Moody's case were established by the former statute.

The third basis for distinguishing *Moody* offered by the petitioner Shelton is that he has already had his federal parole warrant executed, and has received his parole revocation hearing, whereas Moody was still serv-

ing his intervening sentence when his case was decided by the Supreme Court. Once again, this is a difference with no legal significance. It appears that the argument is that Moody, since he had not received his parole revocation hearing at the time of the Supreme Court decision, will eventually have his hearing under the new 1976 statute; that Shelton, since he already had his hearing, had it under the former statute; and that the new statute grants greater options to the Parole Commission than the old statute granted to the Parole Board, in the context of a parole revocation hearing following incarceration for an intervening second crime. However, the Supreme Court decision in *Moody* fully outlined the policies, procedures, and options of the Parole Board under the old statute, and the decision makes clear both that those powers were substantially carried over into the new statute, and that the decision was not based on any of the modifications contained in the new statute.

Thus, the Supreme Court, after acknowledging that the former parole statute and regulations controlled Moody's parole revocation procedures, set out in full exactly what options were available to the Parole Board under the former statute in a situation such as Moody's or Shelton's:

> Throughout the progress of this case below, however, parole revocation procedures were controlled by the former statutes, 18 U.S.C. §§ 4205 and 4207 (1970 ed.). Under them, and the Board's own regulations, 28 CFR § 2.53 (1975), it was the Board's practice to issue a parole violator warrant as a matter of course whenever a federal parolee was convicted of a new offense. Under the former statute and regulations, if the subsequent sentence called for incarceration the warrant was lodged at the institution of confinement as a detainer, for possible later service. A parolee so confined was then notified of the issuance of the unserved war-

rant and given the opportunity to make a written response. Upon receipt of the response the Board was authorized, in its discretion, to conduct a dispositional interview designed to get the facts relevant to its revocation decision. The parolee could retain counsel for the interview and call witnesses. In lieu of an interview, the Board in its discretion could review the parolee's case based on the record and the written response.

After review—or interview—the Board had three options for disposing of its parole violator warrant:

(a) It could execute the warrant immediately and take the parolee into custody. If parole was revoked at that stage, the remainder of the parolee's original federal sentence, reinstated by the parole revocation, would run concurrently with the subsequent sentence from the time of execution of the warrant. 18 U.S.C. § 4205 (1970 ed.). Execution of the warrant deprived the parolee of any good-time credits he may have previously earned on his original sentence under 18 U.S.C. § 4161, and of credit for the time spent while on parole. 18 U.S.C. § 4205 (1970 ed.); 28 CFR § 2.51 (1975).

(b) The Board's second option was to dismiss the warrant and detainer altogether, which operated as a decision not to revoke parole, and under which the parolee retained both his good-time credit and credit for the time spent on parole. Presumably dismissal of the warrant would reflect a Board decision that the violation of conditions of parole was not of such gravity as to justify revocation.

> (c) Third, the Board was free to defer a final decision on parole revocation until expriation of the subsequent sentence, as it elected to do in this case; under this third option, the Board was authorized to execute that warrant, take the parolee into custody immediately upon his release, and then conduct a revocation hearing. Deferral of decision while permitting the warrant to stand unexecuted would operate to allow the original sentence to remain in the status it occupied at the time of the asserted parole violation, 18 U.S.C. § 4205 (1970 ed.); it would not deprive the parolee either of his good time or of the time spent on parole.
>
> Respondent represents that its general practice, before passage of the 1976 Act, was to defer decision in order to have before it the parolee's institutional record during his confinement on the subsequent offense. That record would obviously be highly relevant to the parole revocation decision. Annual reviews of the status of every parolee to whom it had not granted a dispositional interview were conducted under the former statute. 97 S. Ct. at 276-77.

The statutory and regulatory format described by the Court was based upon the same statutes and regulations that controlled the petitioner Shelton's parole revocation procedures and the Parole Board's dispositional options in the petitioner Shelton's parole revocation. As the Court specifically noted (option b above), the Parole Board could have dismissed petitioner Shelton's warrant and detainer altogether, a disposition "which operated as a decision not to revoke parole, and under which the parolee retained both his good-time credit and credit for the time spent on parole." In effect, this disposition

would have the original federal sentence on the initial crime run continuously from the time that Shelton was first incarcerated on the initial crime, through the period of his good time and parole time, and through the period he spent incarcerated in the State institution on the second intervening crime. Of course, this would have the result that, in effect, the initial federal sentence would run concurrently with the second state sentence. It would also have the added benefit, as opposed to revocation of parole immediately at the beginning of the second sentence, of crediting Shelton with good time and parole time on the initial federal crime, both of which would be lost if the parole board revoked his parole at the beginning of his second sentence. The point of emphasizing the dispositional options of the Parole Board, and the Supreme Court's inclusion of these options in its opinion in *Moody*, is to demonstrate that, despite the postponement of the execution of the warrant, and therefore the postponement of the decision on whether to revoke parole, neither Shelton nor Moody ever lost the opportunity to obtain concurrent credit on both the initial crime and the second intervening crime. Accordingly, the Supreme Court stated in *Moody*:

> The other injuries petitioner claims to suffer either do not involve a loss of protected liberty or have not occurred by reason of the warrant and detainer. His real complaint is that he desires to serve his sentence for the 1966 rape conviction concurrently with his sentences for two 1971 homicides. But as we have noted, even after completion of the homicide sentences the Commission retains full discretion to dismiss the warrant or decide, after hearing, that petitioner's parole need not be revoked. If revocation is chosen, the Commission has power to grant, retroactively, the equivalent of concurrent sentences and to provide

> for unconditional or conditional release upon completion of the subsequent sentence. See 18 U.S.C. §§ 4211, 4214(d); 28 CFR §§ 2.21, 2.52(c)(2). Thus, deferral of the revocation decision does not deprive petitioner of any such opportunity; nothing in the statute or regulations gives him any "right" to force the decision of the Commission at this time. 97 S. Ct. at 279.

Since Moody had not yet obtained his revocation hearing, the Supreme Court cited to the options of the Parole Commission under the 1976 Act and its regulations. However, as the former statute, and the Supreme Court's explanation and description of that statute show, the Parole Board also had the power "to grant, retroactively, the equivalent of concurrent sentences." 18 U.S.C. §§ 4205, and 4207 (1970 ed.); 28 C.F.R. § 2.53 (1975); *see Moody* v. *Daggett*, 97 S. Ct. at 276-77, and 276 n. 5 and 6. Former section 4207, "Revocation upon retaking parolee," gave the Board the discretion to revoke *or modify* the parole status. Section 2.53 of Title 28 C.F.R. (1975), "Warrant placed as a detainer and dispositional interview", as the Supreme Court pointed out in *Moody*, gave three dispositional options to the Parole Board, the second of which, "Withdraw the detainer and reinstate to supervision" permitted "the federal sentence time to run uninterruptedly from the time of his original release." If the initial sentence ran uninterruptedly from the original release on the initial federal crime, the prisoner would receive credit on the federal sentence for the time spent incarcerated on the second intervening crime. As the Supreme Court noted in *Moody*, the exercise of this option would "operate as a decision not to revoke parole" and therefore, in addition to concurrency of the initial and second crimes, the parolee would retain both his good-time credit and credit for time spent on parole. 97 S. Ct. at 277.

In light of the statutory and regulatory language, and the Supreme Court's exposition in *Moody* of the options available to the Parole Board, including the option to grant, retroactively the equivalent of concurrent sentences, it is difficult to understand the petitioner's position that the Board lacked this dispositional option. The several pages of the petitioner's brief dedicated to the proposition that in other cases the Parole Board did not raise this option, are irrelevant, even assuming the petitioner's statements are correct. The respondents argued below that the Circuits adopting the minority view, *i.e.* that the Board's procedures were improper, had reached such a conclusion, in part, because they had not considered, for whatever reason, the options available to the Parole Board when the parole warrant was executed following the prisoner's release on the second conviction. These options were specifically brought to the attention of the Supreme Court by the respondent in *Moody* v. *Daggett*, and the Supreme Court recognized the power of the both the new Parole Commission and the old Parole Board to grant, retroactively, the equivalent of concurrent sentences. 97 S. Ct. 276-77 (Board), 279 (Commission); *see Robb* v. *Norton*, 394 F. Supp. 856, 858-59 (D. Conn. 1975) ("By appropriately adjusting the length of time to be served, the Board at a delayed revocation hearing can impose a sentence whose effect is virtually identical with a concurrent revocation sentence imposed at a timely hearing.") Since the statutes and regulations applicable to Shelton granted the Parole Board the power to achieve the effect of retroactive concurrent sentences, should the Board deem it advisable to do so, and the Supreme Court has confirmed the existence of this power in the old Parole Board, the point is settled, and petitioner's argument to the contrary amounts to a valiant attempt to resuscitate, by the incantation of lower court case citations, a legal controversy that has been dead and buried since November of 1976.

A variation of this argument, that the petitioner was prejudiced by a lost opportunity for concurrent sentences, is found in Point 1A of petitioner's brief on appeal. This point alleges that the Parole Board did not follow its own procedures in handling its review of the detainer placed against Shelton. This argument is raised for the first time on appeal. The point is described as a variation of the preceding argument because the basic claim is that "appellant lost all opportunity to present his evidence [in mitigation] at a time when it would have been most beneficial to him." Appellant's brief, p. 26. Once again, this claim of prejudice erroneously assumes that the Parole Board could not hear all the same evidence following petitioner's release on the second sentence, and grant retroactively the same relief that it could have afforded at any of the intermediate reviews. Shelton does not claim that any evidence of mitigation was lost. In fact, the case is just the reverse, evidence was gained by postponing the hearing until his release from the New Jersey prison. Shelton was enabled to put before the Board his record of rehabilitation compiled during his incarceration and thereby significantly bolster any argument for withdrawing the warrant, and deciding not to revoke his parole.

In addition, the record clearly shows that the Parole Board followed the procedures outlined in 28 C.F.R. 2.53 (1975) in Shelton's case, and gave him the yearly review required by that section. Nothing prevented Shelton from making the Board aware, at that time, of the same version of the circumstances surrounding his second intervening crime which he put before the Parole Board at his revocation hearing in 1975.

Fourth and finally, petitioner argues that the lodging of the federal parole violator detainer against him, adversely affected the conditions of his incarceration on the second intervening crime, and that this point was

not decided in *Moody*. A reading of the *Moody* decision shows that petitioner's interpretation is simply incorrect. Moody argued in the Supreme Court that the lodging of the parole warrant against him as a detainer "retards his parole eligibility on the later convictions and adversely affects his prison classification status." 97 S. Ct. at 278. The Court rejected this argument finding that "the other injuries petitioner claims to suffer either do not involve a loss of protected liberty or have not occurred by reason of the warrant and detainer." *Id.* at 279. With regard to the adverse affect on prison classification, and therefore on eligibility for some benefits, the court stated:

> Petitioner also argues that the pending warrant and detainer adversely affect his prison classification and qualification for institutional programs. We have rejected the notion that every state action carrying adverse consequences for prison inmates automatically activates a due process right. In *Meachum* v. *Fano*, — U.S. —, 96 S. Ct. 2532, 49 L. Ed. 2d ——, for example, no due process protections were required upon the discretionary transfer of state prisoners to a substantially less agreeable prison, even where the transfer visited a "grievous loss" upon the inmate. The same is true of prisoner classification and eligilibility for rehabilitative programs in the federal system. Congress has given federal prison officials full discretion to control these conditions of confinement, 18 U.S.C. § 4081, and petitioner has no legitimate statutory or constitutional entitlement to invoke due process. 97 S. Ct. at 279 n. 9.

Shelton's only claim of prejudice is that he was denied the opportunity to participate in a *single* educational release program as a result of the lodging of the federal

detainer against him. Even under cases decided prior to *Moody* and *Meachum* such a limited adverse effect would not be sufficient to invoke a due process right. *See Cardaropoli* v. *Norton*, 523 F.2d 990 (2d Cir. 1975) (combined denial of "social furloughs, work release, transfer to Community Treatment Center, and the opportunity for early parole" cognizable factors under due process clause). In any event, the petitioner Shelton has very little support in the record for a denial of rehabilitative opportunities.* He was eligible for, and received, parole from New Jersey despite the fact that the detainer was lodged against him. Both the 1972 and the 1973 report of the Case Analyst for the Parole Board indicate that Shelton had made good use of the rehabilitative programs offered. Shelton wrote to the Parole Board to point out the various rehabilitative programs in which he participated. During his time in the New Jersey prison, he earned an Associate in Arts degree and participated in Alcoholics Anonymous and other programs. App. Exh. E-K, U. Consequently, Shelton's argument that the lodging of the detainer prejudiced him in a significant manner fails from both a legal and factual perspective.

Furthermore, it should also be noted that Shelton's claim to this Court concerns denial of due process, not the conditions of petitioner's incarceration in New Jersey. Since Shelton has long since been released from New

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* The record is not even clear as to the one claim of prejudice that Shelton does make, denial of access to a college work release study program. App. Exh. T indicates that "We cannot guarantee at this time what the program will be. However, we would like to know just who is interested . . ." App. Exh. V, a letter from an official of a community college states that "it is *probable* that Mr. Shelton was denied admission to a study-release program because of the federal detainer." (Emphasis added.)

Jersey incarceration, and is now on parole, the contention that he was denied access to an educational program offered by the New Jersey institution is obviously moot.*

Since Shelton's attempts to distinguish the holdings of the Supreme Court in *Moody* v. *Daggett* are without merit, the present case is controlled by the holding in *Moody*, and consequently the order of the district court dismissing the petition for habeas corpus should be affirmed.

POINT II

The District Court Correctly Dismissed The Petition For Writ Of Habeas Corpus On The Ground That It Would Be An Improvident Exercise Of Jurisdiction To Grant The Relief Sought By The Petitioner Shelton.

The District Court dismissed Shelton's petition for Writ of Habeas Corpus on the ground that it would be an improvident exercise of jurisdiction to grant the relief Shelton sought. The court found, on page 2-3,

> We are unable to grant the relief requested because we have no jurisdiction pursuant to 18 U.S.C. § 2241 over the detainer in question or its consequences. Any challenge to the detainer, we believe, must be brought in the United States District Court in New Jersey—the district where the detainer was lodged and where the original federal sentence was imposed.

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* As is pointed out in Point II, *infra*, Shelton filed a petition in the United States District Court for the District of New Jersey, claiming that he was improperly denied participation in the educational release program. That petition was denied.

A footnote to the above finding further develops the grounds of the district court's dismissal:

> 3. Shelton did in fact file a petition for writ of habeas corpus in the United States District Court for the District of New Jersey in October, 1974. That court had not rendered its decision by late October, 1975, when Shelton was first before us. However, on June 17, 1975, in an unreported decision, the Third Circuit held that the Parole Board policy in question here is not invalid. *Orr* v. *Saxbe*, No. 75-1042. App. Exh. Z, p. 4.

Contrary to what petitioner asserts in the brief on appeal, the respondents raised the objection in the court below that to grant Shelton the relief he requested would be an improvident exercise of jurisdiction. In its brief submitted in opposition to the Petition for Writ of Habeas Corpus, the respondent argued, on page 29, as follows:

> Furthermore, it should be noted that we are concerned in this petition with a claim of denial of due process. This court does not have jurisdiction over the New Jersey prison at Leesburg and cannot order it to allow a certain prisoner into a particular educational program. If any federal forum were appropriate for petitioner's claim that he should have been allowed into the educational program at Leesburg, it would be the District Court for the District of New Jersey. Petitioner himself has recognized this and filed a petition with that court while he was at Leesburg, contending, as he does here, that he was denied participation in an educational program. That petition was denied (Petitioner's memorandum, p. 5) and petitioner should not be allowed to relitigate this issue. Since petitioner has now been released from Leesburg, and is presently in a federal institution, the

> contention that he was denied access to an educational program offered by Leesburg is obviously moot.*

The Third Circuit decision in *Orr* v. *Saxbe*, referred to by the District Court, had also been placed before the Court (as Petitioner's Exhibit H in the district court), and was relied upon by the respondents in both their memorandum of law below, and at the oral argument below. At oral argument counsel for respondent emphasized that the Third Circuit in *Orr* v. *Saxbe* had held that the Parole Board's policy of postponing the execution of the parole warrant and consequently postponing the hearing on parole revocation, constituted no violation of due process of law. Had Shelton never left the Third Circuit, therefore, his due process claim would have been rejected in any habeas proceeding. In fact, Shelton had made a habeas application in the New Jersey federal district court, within the Third Circuit, and this application was denied. In the present case, it was argued in the district court that, in light of the decisional split in the Circuits, the district court in the Southern District of New York, would, in effect, be overruling the decision of the Third Circuit in *Orr* v. *Saxbe*, if it found a violation of due process of law and granted the relief that petitioner requested.

By dismissing the petition on the basis of this argument, the district court impliedly held that its jurisdictional authority should not be exercised to grant petitioner relief that would not have been granted by the federal courts in the district where the alleged violation of

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* The petitioner's memorandum of law in the court below stated on page 5, "I have been advised by the clerk of the New Jersey District Judge that the petition is to be denied based on an unreported Third Circuit opinion in *Orr* v. *Saxbe*. . . ."

petitioner's rights occurred. To have held otherwise would be an encouragement to forum-shopping. It would also have made the relief available to prisoners dependent upon the completely independent factors utilized by prison officials in deciding to transfer prisoners from prison to prison. A prisoner transferred from a prison located in one of the Circuits holding the majority viewpoint, to a prison located in a Circuit holding the minority view, could then utilize the minority viewpoint to obtain relief on the very same complaint, and underlying incidents, that would have been denied in the Circuit in which those incidents occurred. The respondents urged to the district court that this would be an unseemly result whether or not the district court and the Second Circuit took the majority or minority positions with regard to the issue in controversy. The district court accepted this argument in its memorandum decision and found, that, although it agreed with the minority position, it would not grant the petitioner the relief requested, since this would be an improvident exercise of jurisdiction. With regard to the petitioner's claim that he should have been allowed to participate in the educational program, despite the detainer against him, the court also found that this was properly considered a challenge to the policy of the institution incarcerating him at the time, and that such a challenge was appropriate only in the district in which that policy was implemented. Petitioner himself implicitly recognized the correctness of the district court's analysis by bringing the prior habeas petition in the District Court for the District of New Jersey.

In sum, the district court's dismissal of the petition on the grounds that granting of the relief requested would be an improvident exercise of jurisdiction is correct, since to have done otherwise would have denied "other courts of appeals the respect and comity which are their due." *Bijeol* v. *Benson*, 513 F.2d 965, 968 (7th Cir. 1975).

POINT III

The Petitioner Has Already Received All The Relief To Which He Would Be Entitled, Under The Second Circuit Law Prior To The Supreme Court's Holding In *Moody* v. *Daggett*.

In Shelton's Petition for Writ of Habeas Corpus, page 4, he claimed that, because of the Board's alleged failure to grant him a prompt revocation hearing,

> the detainer must be removed and petitioner immediately re-released on parole. Alternately, petitioner must be afforded a local parol revocation hearing at the Metropolitan Correction Center with representation by counsel.

As the record shows, and petitioner admits, Shelton received, with the consent and cooperation of the respondents, a local parole revocation hearing at the Metropolitan Correctional Center on November 4, 1975. At that hearing he was also represented by the counsel who represents him on appeal. Despite the fact that he obtained the relief requested in his petition, Shelton now claims that in addition he is entitled to have the parole violator warrant quashed and, as a consequence, to have his initial federal parole run continuously, just as if he had never committed a crime while on parole.

The Supreme Court explicitly held in *Moody* v. *Daggett*, that the procedures of which the petitioner complains trigger no due process right. Since no due process right has been violated, it is of course analytically and legally unnecessary to inquire further as to whether, if there had been such a due process right, petitioner, would be entitled to the relief he requests. However, in the in-

terest of completeness, respondents draw the Court's attention to the rule in the Second Circuit that the relief petitioner requests on appeal requires a showing of actual prejudice. "To merit this relief [quashing the detainer and underlying parole violator warrant], the petitioner must demonstrate actual prejudice resulting from the unreasonable delay in holding a parole revocation hearing." *Robb* v. *Norton*, 394 F. Supp. 856, 858 (D. Conn. 1975); see *Shepard* v. *United States Board of Parole*, — F.2d — (2d Cir. Sept. 7, 1976; Docket No. 76-2021) Section VIII, Slip Opn., pp. 5427-28 (upon pre-*Moody* finding of due process violation, Court of Appeals remanded to District Court; in order to quash warrant petitioner must have been so prejudiced in his ability to adduce mitigating evidence that a constitutionally adequate review of the detainer was no longer possible); *United States ex rel. Blasingame* v. *Gengler*, 502 F.2d 1388 (2d Cir. 1974); *United States ex rel. Buono* v. *Kenton*, 287 F.2d 534 (2d Cir. 1961).

Since petitioner Shelton's evidence in mitigation was directed toward a presentation of the rehabilitative record that he achieved while incarcerated in prison in New Jersey and his own explanation of the reason that he was led to commit his crime, any alleged violation of petitioner's rights would have been cured by the hearing he received from the Board in November, 1975. His presentation of mitigating factors was in no way prejudiced by holding the hearing after his release from the New Jersey prison, rather than upon his first entrance to that prison.

CONCLUSION

Accordingly, the order of the district court dismissing the petition for writ of habeas corpus should be affirmed.

Dated: New York, New York
January 12, 1977

Respectfully submitted,

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State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 14th day of January, 1977 she served two copies of the within Brief of Respondents-Appellees

by placing the same in a properly postpaid franked envelope addressed:

William J. Gallagher, Esquire
The Legal Aid Society
Federal Defenders Services Unit
509 United States Courthouse
Foley Square
New York, New York 10007

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

14th day of January 1977

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978